

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 132 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

HEIRS OF ABDULBHAI ISMAILBHAI

Versus

STATE OF GUJARAT

Appearance:

MR.NARENDRA RAMNANI FOR MR.S.R.SHAH FOR APPELLANT
MR.SP DAVE ASSTT GOVERNMENT PLEADER for Respondent No. 1

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 17/06/2000

ORAL JUDGEMENT

#. This Second Appeal against the judgment and decree dated December 21, 1981 recorded in Regular Civil Appeal No. 144 of 1980 by the learned Assistant Judge, Nadiad at the instance of plaintiff, was admitted for hearing on the following substantial question of law.

"Whether the courts below were right in referring
to provisions of the prohibition Act, when
seizure was by Forest Officers ? "

#. The appellants are the heirs and legal
representatives of the original plaintiff whereas, the
respondent is the original defendant and therefore,
hereinafter they are referred to as the plaintiff and
defendant for the sake of convenience and brevity in this
judgment.

#. The case of the plaintiff was that on May 7, 1975,
the Deputy Conservator of Forest, Chhota Udepur had
illegally seized 88 bags of Mahuda Flowers from the
plaintiff and therefore, the plaintiff informed the
Conservator of Forest, Baroda and requested him to return
the said goods which were seized illegally from the
plaintiff. The Deputy Conservator of Forest had
published a resolutions in July, 1975 to sell goods in
dispute by public auction. Prior to issuance of
aforesaid resolution, a notice dated August 4, 1975 was
issued to the plaintiff asking as to why the goods seized
should not be confiscated to the Government. The
defendant replied to the said notice and thereafter, the
forest authority passed order dated September 29, 1975 to
sell the goods in dispute by public auction and
ultimately, the forest authority sold away 74 bags of
Mahuda Flowers in consideration of Rs.4,000/- by public
auction. It was pleaded by the plaintiff that
confiscation of the goods in dispute and ordering sale of
the said goods by public auction by the forest officer
Chhota Udepur was illegal. Therefore, the plaintiff had
filed suit claiming damages as the goods - Mahuda Flowers
were illegally sold and the sale proceeds were illegally
confiscated to the State Government. Accordingly, the
plaintiff has claimed to recover the following amounts.

Rs.5380-00 As damages at the rate of Rs.60/- per bag
for 88 bags of Mahuda which were seized
and its price was confiscated.

Rs.1847-20 Interest at rate of 12 % P.A. from
7-5-75 to 27-4-77.

Rs.7127-20 P. Total claim.

#. The suit was resisted and contested by the defendant
by filing written statement. The defendant interalia
denied all the contentions and averments made in the

plaint. It was further contended that only 74 bags were seized by the defendant from the plaintiff. It was admitted by the defendant that in public auction of goods in dispute, Rs.4,000/- were realised and the said amount was kept as deposit. It was denied that the Deputy Conservator of Forest, Chhota Udepur acted illegally. It was also denied that he was not empowered to seize the goods. It was contended that the said Mahuda Flowers were forest produce and transportation of the said goods was an illegal act under Section 26(1)(c) and 41(2) (b) of the Indian Forest Act, 1927 [hereinafter referred to as 'the Act'] and Rule 66 of the Bombay Forest Rules [hereinafter referred to as 'the Rules'] . It was further contended that on inquiry being made it was found that the plaintiff was in possession of the 73 bags + 1 Bachaka of Mahuda flowers. Consequently, a registered notice dated 8-8-75 came to be issued upon the plaintiff giving him opportunity to show cause as to why the goods should not be sold in public auction but the plaintiff gave evasive and unsatisfactory reply and hence, there was reason to believe that the said collection and transportation of mahuda flowers was illegal and unauthorised and accordingly it was seized and confiscated and sold in accordance with law. It was also further contended that the plaintiff neither paid fees nor applied for authorisation for collection of Mahuda flowers. It was also contended that the goods in dispute were being perishable commodities, they were sold and the amount of Rs.4000/- so realised from the auction are kept as deposit till the matter is finally decided. The defendant, thus, claimed that the suit filed by the plaintiff was false and the plaintiff was not entitled to any relief and accordingly prayed for dismissal of the suit.

#. Following issues were framed by the learned trial Judge on the basis of the pleadings of the parties.

1. Whether the plaintiff proves that Mahuda flowers
"88 bags, each of wt. of 65 K.G. and of price of Rs.60/- belonged to and was in legal possession of the plaintiff as alleged ?
2. Whether the plaintiff proves that on 7-5-75 at Borsad, Deputy Conservation Forest Officer had illegally and dishonestly seized the 88 bags of mahuda flowers from the plaintiff as alleged ?
3. Whether the defendant proves that only 74 bags of mahuda flowers were seized by its officer from the plaintiff as alleged ?

4. Whether the deflt. proves that the collection and transportation of the suit mahuda flowers was illegal and unauthorised and so the same as per provision of the forest Act and forest Rules were legally seized from the plaintiff as alleged ?
5. Whether the plaintiff proves that he is entitled to recover Rs.5280/- as price of 88 bags of the suit mahuda flowers from the deflt. alleged ?
6. Whether the pltff. proves that he is entitled to recover interest Rs.1847-20 p. as interest at the rate of 12 P.C. per year from 7-5-75 to the date of the suit on the principal amounts of Rs.5280/- as alleged ?
7. Whether the pltff. proves that he is entitled to recover further interest on the principal amount ? If yes, at what rate and what amount ?
8. Whether the defendant proves that observations made in the order passed in appeal No.94/75 are not binding to this court as alleged in W.S. Ex. 17 para 10 ?
9. What order and decree ?

#. The trial court has decided all the issues against the plaintiff, whereas the Issue No.4 was decided in favour of the defendant and Issue Nos.3 and 8 were not decided since they became redundant. Resultantly, the trial court came to the conclusion that the plaintiff failed to prove that the 88 bags of Mahuda flowers belonged to him and were in his legal possession. Plaintiff also failed to prove that the Deputy Conservator of Forest had illegally and dishonestly seized 88 bags of Mahuda flowers from the plaintiff. The trial court also came to the conclusion that the defendant proved that the collection and transportation of the said Mahuda flowers was illegal and unauthorised and as per the provisions of the Act and Rules, they were legally seized from the plaintiff and therefore, the plaintiff was not entitled to recover the amount and interest claimed in the suit and resultantly, dismissed the suit filed by the plaintiff vide judgment and decree dated April 30, 1980.

#. Aggrieved thereby, the plaintiff filed Regular Civil Appeal No.144 of 1980 before the District Court of Nadiad. The learned Assistant Judge, Nadiad on

reappreciation and reevaluation of the evidence adduced and produced before the trial court came to the conclusion that the trial court has not erred in dismissing the suit filed by the plaintiff and resultantly, he dismissed the appeal vide order dated December 21, 1981 affirming the judgment and decree recorded by the trial court.

#. Mr.Narendra Ramnani, learned advocate for the appellant contended that the both the courts below have erred in casting onus of proof upon the plaintiff to show that the disputed Mahuda flowers were of the vacation period of 1975, even though no evidence is adduced, either oral or documentary, by the respondent to show that there was any reason to believe that any forest offence is committed in respect of disputed Mahuda flowers before making seizure. It is stressed that in absence of any such evidence, seizure becomes absolutely exfacie illegal and unauthorised and in absence of any evidence, oral or documentary, to show that the Deputy Forest Officer had reason to believe that a forest offence was committed by the plaintiff with regard to the disputed Mahuda flowers, the seizure becomes absolutely illegal and unauthorised and the Court below should have held that no evidence on the part of the plaintiff was necessary, once the illegality of the seizure becomes apparent from not adducing any evidence, either oral or documentary, on the part of Government. It is maintained that in view of the provisions of Section 52 of the Act, any forest produce can be seized in the case when there is reason to believe that a forest offence has been committed in respect of the forest produce or any forest produce belong to the Government. It is vehemently submitted by the learned counsel that the lower appellate court has referred to in its judgment the provisions of the Bombay Prohibition Act which give powers only to the police officers to raid the premises and to make seizure and confiscation, and therefore also, the forest officer has no right to seize the goods. Ultimately, it is contended that the judgment and decree recorded by the lower appellate court affirming the judgment and decree passed by the trial court is bad in law and is liable to be set aside at the hands of this Court by allowing the appeal and thereby passing a decree in favour of the plaintiff as claimed for.

##. In counter submission, Mr. S.P.Dave, learned AGP for respondent State through out supported the judgment of the lower appellate court and maintained that in fact there is no substantial question of law which requires to be tried and answered by this Court. The concurrent

findings of fact recorded by both the courts below cannot be lightly or leniently disturbed in the second appeal and when there is no substantial question of law in this appeal, this appeal is required to be dismissed by confirming the judgment and decree recorded by the lower appellate court. Ultimately, he prayed for dismissal of the appeal.

##. There is no manner of doubt that Mahuda flowers were in possession of the plaintiff at Borsad and on May 7, 1975, when the Deputy Conservator of Forest, Chhota Udepur seized the said goods from the plaintiff. Thereafter, notice came to be served upon the plaintiff for showing cause as to why the said goods - Mahuda flowers be not confiscated and thereafter be sold by public auction in accordance with procedure prescribed under the law. The plaintiff has tendered oral evidence vide Exh.27 wherein, he inter alia testified that the said Mahuda flowers were purchased by his father and the said flowers were brought from Savali to Borsad. He also admitted that before purchasing the said goods - Mahuda flowers, it was necessary to obtain permission of the concerned authority and in absence of the permission of the authority, purchase will be illegal and he unequivocally admitted that neither he nor his father had obtained such permission from the concerned appropriate authority. The defendant in its written statement has invoked powers under Sections 26(1) (c) and 41(2) (b) of the Indian Forest Act, 1927 and Rule 66 of the Bombay Forest Rules.

##. In order to appreciate the controversy, it would be advantageous to refer Section 26(1)(c) of the Act which reads as under;

26. Acts prohibited in such forest.

(1) Any person who, -

(a) and (b)

(c) kindles, keeps or carries any fire except

at such seasons as the Forest Officer may notify in this behalf;

(d) (j)

shall be punishable with imprisonment for a term

which may extend to six months, or with fine which may extend to five hundred rupees, or with both in addition to such compensation for damage done to the forest as the convicting Court may

direct to be paid. "

##. On careful scrutiny of the sub clause (c) of sub Section (1) of Section 26, the persons who kindles, keeps or carries any fire except at such seasons as the Forest Officer may notify in this behalf is punishable with imprisonment, meaning thereby, such provision is penal in nature. Admittedly, the plaintiff had not taken any pass or permit to keep the Mahuda flowers or keep and / or transport and / or sell the goods of Mahuda flowers.

##. It would also be relevant to refer Section 41(2)(b) of the Act which reads as under :-

41. Power to make rules to regulate transit
of forest produce. - (1) ...
(2) In particular and without prejudice to
the generally of the foregoing power, such rules
may -
(a)
(b) prohibit the import or export or moving
of such timber or other produce without a pass
from an officer duly authorized to issue the
same, or otherwise than in accordance with the
conditions of such pass : "

##. The aforesaid Sections empower State Government to make rules to regulate the transit of forest produce and by virtue of sub clause (b), it prohibits import or export or moving of such timber or other produce without a pass from an officer duly authorised to issue the same or otherwise than in accordance with conditions of such pass. Admittedly, as per plaintiff's own evidence, neither he nor his father had obtained any pass or permit for transportation, sale or possession of the said goods - Mahuda flowers. There is no manner of doubt that in view of provisions of Section 26(1)(c), a forest offence has been committed by the plaintiff with respect to forest produce which gives powers to the forest officers to seize the said goods by virtue of Section 52 of the Act. By virtue of Section 55 of the Act, the forest produce are liable to be confiscated and such powers of seizer and confiscation are in addition to power to impose punishment prescribed for such offence. Admittedly, in this case, no offence was registered against the plaintiff, therefore, he was not prosecuted but that is not necessary to invoke powers under Sections 52 and 55 of the Act for the purpose of seizure and confiscation of the goods - Mahuda flowers. Be it noted that said powers are independent powers in addition to power to impose punishment prescribed for such offence

under the Act.

##. It may be appreciated that before invoking such powers, the plaintiff was served with the notice. The plaintiff could not satisfactorily reply nor he had produced any pass or permit and on the contrary, he has admitted in his own evidence that neither he nor his father had obtained pass or permit to transport, sell or keep the said goods - Mahuda flowers.

##. It is true that the learned trial Judge as well as the learned appellate Judge in their judgments have referred to and relied upon Sections 60 and 69 of the Bombay Prohibition Act and provisions contained in the rules of Bombay Mahuda Flowers Rules, 1950. As per the said provisions also, for transportation or possession of Mahuda flowers, licence or permit is necessary. Accordingly, it can be said that if the Mahuda flowers are being transported from one place to another, the permission to transport Mahuda flowers are required, but in the instant case, neither pass nor permit for transporting or keeping the said goods in possession was obtained and in such eventuality, the possession of said goods is illegal. It may be noted that the defendant vide in its written statement has neither contended nor referred to any of the provisions of the Bombay Prohibition Act. It has referred to the provisions of the Act and Rules. Both the courts below have referred to the provisions of Bombay Prohibition Act without any pleadings of the defendant. The learned trial Judge has discussed at length the provisions of the Act and rules under which the defendant has seized and confiscated the goods Mahuda flowers. In view of aforesaid discussion, I am of the opinion that both the courts below have referred to the provisions of Bombay Prohibition Act in addition to the provisions contained in the Act and Rules. Therefore, in my view both the courts below were right in referring to the provisions of Bombay Prohibition Act though it was not necessary when the seizure was made by the forest officer under the Act.

##. Now this takes me to the concurrent finding of facts recorded by the both the courts below. At the risk of repetition be it stated that the collection and transportation of Mahuda flowers was illegal and unauthorised, and therefore, they were seized and confiscated and sold away as per the law. The said Mahuda flowers being perishable commodity, were sold by public auction after having served proper notice to the plaintiff and an amount of Rs.4000/- were realised from the sale which was kept as deposit till the matter is

finally decided. Village Savalia falls within the jurisdiction of Godhara Forest Division and as the said goods were brought from Savalia to Borsad and for that, the plaintiff had neither paid fees nor applied for permission for collection of Mahuda flowers, and hence plaintiff had no right to collect, possess, transport or sell said Mahuda flowers.

##. It is settled proposition of law that the concurrent findings of fact recorded by both the Courts below cannot be assailed in Second Appeal, since the power envisaged under Section 100 is limited and confined only to the substantial question of law.

##. I am fortified in my above view by the judgment of the Honourable Apex Court in the case of KARNATAKA BOARD OF WAKF V. ANJUMAN-E-ISMAIL MADRIS-UN-NISWAN.. (1999) 6 SCC 343, wherein the Honourable Supreme Court has observed that concurrent findings of fact cannot be assailed in second appeal. In the case of PANCHGOPAL BARUA AND ORS. VS. UMESH CHANDRA GOSWAMI AND ORS. JT. 1997 (2) S.C. 554, the Honourable Apex Court has held that substantial question of law is sine-qua-non for exercise of jurisdiction under Section 100 of the Code. It was further held that generally speaking, an appellant is not to be allowed to set up a new case in second appeal or raise a new issue (otherwise than a jurisdictional one), not supported by the pleadings or evidence on the record and unless the appeal involves a substantial question of law, a second appeal shall not lie to the High Court under the amended provisions.

##. For the foregoing reasons, the substantial question of law on which this appeal was admitted for hearing is answered accordingly and against the plaintiff.

##. In the net result, this appeal fails and accordingly it is dismissed with no order as to costs.

Date : 17-6-2000 [A. M. KAPADIA, J.]

#kailash#